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MICHAEL EDDY, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-991

BEL MARIN ENTERPRISES, INC., A CALIFORNIA CORPORATION;
KAL W. LINES, TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

BEL MARIN KEYS COMMUNITY SERVICES DISTRICT, A PUBLIC
DISTRICT OF THE STATE OF CALIFORNIA; O. W. OSTER-
LUND; S. A. SHARP; H. D. LAWSON; GEORGE SHU-
LESHKO; ADELINE D. FOX; CHARLES W. FOX;
and STIG RASMUSSEN,
Respondents,

WATERWAY PROPERTIES; PAGE CONSTRUCTION; WESTERN DOCK
ENTERPRISES; ROBERT CONWAY; MARY GOUVEIA; DUNCAN
HAROLDSON, INC.; and DOES 1 THROUGH 10, Inclusive,
Other Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit remanding this case to the United States Bankruptcy Court with orders to dismiss for want of jurisdiction is published at 582 F.2d 477.

The United States District Court for the Northern District of California Judge Robert A. Schnake presiding, on

March 29, 1976, affirmed a judgment in declaratory relief wherein the Bankruptcy Judge, Conley Brown, declared right, title and ownership in certain property to be in Kal W. Lines, the Trustee of the estate of the bankrupt, Bel Marin Enterprises, Inc. The judgment of the Bankruptcy Court was filed on July 31, 1975.

JURISDICTION

Opinion No. 76-1982 (attached hereto as Appendix A) of the United States Court of Appeals of the Ninth Circuit was filed on August 10, 1978. Petitioner's/Appellee's Petition for Rehearing was filed on August 24, 1978.

By Order No. 76-1982 (attached hereto as Appendix B along with the Bankruptcy Court judgment and the District Court Order affirming judgment for Petitioner) filed September 21, 1978, the United States Court of Appeals for the Ninth Circuit denied Petitioner's/Appellee's Petition for Rehearing.

Petitioner maintains that jurisdiction properly belongs with the Bankruptcy Court, as the Bankruptcy Court had custody and control of the res which is the subject matter of this action.

Petitioner further asserts that this Court has supervisory power over inferior courts and Petitioner prays such power to be exercised herein to correct, what Petitioner believes, is a denial of access to a fair judicial determination.

The sole issue in this case is jurisdiction. If the United States Bankruptcy Court had jurisdiction to decide the issue of "Easement A" as it concluded it did, and as the United States District concluded it did, this Court then has

jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit, which concluded that the United States Bankruptcy Court did *not* have jurisdiction.

This Court has jurisdiction pursuant to Rule 191(b) of the United States Supreme Court Rules, in that Petitioner respectfully seeks to show that the United States Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Rule 191(b) United States Supreme Court Rules.)

Further, this Court has jurisdiction pursuant to Title 11 Section 11, et seq. of the United States Code, commonly referred to as Section 2 of the Bankruptcy Act. (Section 2 is attached hereto as Appendix C.) This Petition is based on a substantial Federal question, i.e., does the United States Bankruptcy Court have summary jurisdiction in this matter? As the courts of bankruptcy are vested exclusively with all jurisdiction in bankruptcy proceedings throughout the entire country, they should not be construed as courts of limited jurisdiction. *In re Marion Contract and Construction Company* (B.C.-Ky.) 166 Fed. 618, 22 Am.B. 81.

Adjudication in bankruptcy is conclusive and not open to collateral attack, and the jurisdiction obtained is exclusive of all other courts, State or Federal. *Petition of Shortridge* (CA 9) 20 F.2d 638, 10 Am.B. (N.S.) 413.

The exclusive jurisdiction of the Bankruptcy Court can not be ousted by the bringing of a suit in the State Court. *In re Tune* (D.C. Ala.) 115 Fed. 906, 8 Am.B. 285. A Fed-

eral District Court may enjoin proceedings in a State Court. Such an order is validly issued under the paramount constitutional provision relating to bankruptcy wherein the National Courts have exclusive jurisdiction or wherein the res was within the prior exclusive possession of the Federal Court. *Superior Court v. U.S. District Court* (C.A. 9) 256 F.2d 844.

The Court of Bankruptcy has complete power to dispose of all questions arising as to liens upon property within its custody to allow or disallow claims, to determine "the validity and amount" of all claims, and to decide all controversies with regard to the bankruptcy estate. *In re Chicago Rys. Co.* (C.A. 7) 175 F.2d 282.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Bankruptcy Court for the Northern District of California have summary jurisdiction to decide the issue of ownership of "Easement A", as it did in that Court's Findings and Conclusions?

2. If actual and constructive possession of "Easement A" was with the Trustee in Bankruptcy, did jurisdiction over the res, "Easement A", properly establish jurisdiction of the United States Bankruptcy Court?

STATEMENT

The sole issue before the United States Court of Appeals for the Ninth Circuit was whether or not the Bankruptcy Court had summary jurisdiction to decide the question of the existence of the easement, if any, known to the record as "Easement A". The Court of Appeals decided the Bankruptcy Court was without jurisdiction to proceed

in a summary manner. The opinion of the Court vacated the judgment of the District Court and remanded to the Bankruptcy Court with directions to dismiss the proceeding for want of jurisdiction. The following facts were submitted to the Court of Appeals on the record on Appeal and are herein submitted to this Court in this Petition:

1. Bel Marin Keys Community Services District ("District") acquired ownership of lots 167 and 168 on January 3, 1966, by a donative conveyance by deed. This deed contained a description of the property conveyed with the following reservation:

"Reserving therefrom, a private exclusive easement for private boat docking, storage, and anchorage purposes, over, across, upon and under those portions of those certain 20' private boat dockings, storage, and anchorage easements lying within the prolongation of the lot sidelines of lot 167, as shown on that certain map entitled "Map of Bel Marin Keys, Unit 1-A, in the County of Marin, California" filed January 14, 1963 in Book 11 of Maps at p. 58, Marin County Records, and lot 168, as shown upon that certain map entitled "Bel Marin Keys, Unit No. 2, in the County of Marin, California" filed July 27, 1964, in Book 12 of Maps at p. 87, Marin County Records." (Appendix, p. A-6)

2. District subsequently passed two resolutions accepting the donative deed of lots 167 and 168. Both resolutions of acceptance contained the words "*subject to all existing easements of record*" but did not specifically mention the subject "Easement A". The fact is, the acceptance resolutions did not need to mention "Easement A" with particu-

larity. The deed which constituted the donative conveyance very clearly delineated "Easement A" by description and reference to the specific recorded documents which established "Easement A" by reservation. (Note particularly page A-6, lines 19 through 22 of the Court of Appeals opinion attached hereto as Appendix A.) The reference in the donative conveyance is to volume 12 of Maps, page 87, of the Records of Marin County, to wit:

"We hereby establish an exclusive private easement as follows: That portion of the area designated as 'private boat docking, storage and anchorage of easement' and lying within the prolongation of the sidelines of each lot shown hereon is hereby established as an exclusive private easement for boatdocking, storage, and anchorage purposes for the sole and exclusive use of the owner of such lot.

"We hereby reserve 'Easement A' as an exclusive easement for private boat docking, storage and anchorage purposes for the exclusive use of the owners of record of lots 1-30, inclusive, of 'The Gardens' as recorded in volume 12 of Maps, page 52, Records of Marin County." (Appendix, p. A-5)

3. The "we" refers to Jack West, Jr. and his wife ("West") who originated a land development project pursuant to a number of *approved* subdivision maps and plans, including a map entitled "Bel Marin Keys, Unit No. 2". West was a predecessor in interest to the Trustee in Bankruptcy, Kal W. Lines ("Lines").

4. West was the record owner of lots 1-30, inclusive, known as "The Gardens" when the owner's declaration was filed on July 27, 1964. The description of "The Gardens" consists of seven (7) sheets of recorded maps, as well as detailed metes and bounds descriptions of "Easement A".

5. Subsequent to the donative conveyance of lots 167 and 168, West, for valuable consideration, conveyed title to lots 1-30, inclusive. Legal title to the Garden Apartments went through various mesne conveyances until held by the Bankrupt, Bel Marin Enterprises, predecessor in interest to Lines, the Trustee in Bankruptcy. While these transfers did not specifically refer to or describe "Easement A", each of these transfers carried "Easement A" by operation of California Law, whether it be the Subdivision Map Act (California Civil Code § 1104) or the offer and acceptance of lots 167 and 168 by District as aforementioned. (See Argument, *infra*.)

6. The property in question is a boatdocking easement, known as "Easement A", located in and beside a man-made lagoon and which formed the central core of a unified, water-based, land development project known as Bel Marin Keys, situated along the Novato River in the County of Marin, State of California.

The Bankruptcy Judge found and declared:

(1) That right and title to "Easement A" was in the Trustee in Bankruptcy, being appurtenant to the thirty (30) townhouse garden apartments, right and title to which was found and declared to be in the Trustee, (Finding XXXIV, Conclusion XXXVI and XXXVII; and

(2) That said right and title to "Easement A" carried the right to build 30 boat docks to the owners of the thirty (30) garden apartments, as expressly provided for and reserved on the pertinent subdivision maps. (Conclusion XXXVII and XXXVIII.) See Findings and Conclusions at Appendix D.)

On appeal to the United States District Court, the order and judgment of the Bankruptcy Court was affirmed. (See Appendix B)

On appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the judgment of the Bankruptcy Court was ordered vacated and dismissed for want of and judgment of the Bankruptcy Court was affirmed. (See Appendix B)

ARGUMENT

I. THE UNITED STATES BANKRUPTCY COURT OF THE NORTHERN DISTRICT OF CALIFORNIA HAD SUMMARY JURISDICTION TO DECIDE THE ISSUE OF OWNERSHIP OF "EASEMENT A" AS IT DID IN THAT COURT'S FINDINGS AND CONCLUSIONS.

SUMMARY JURISDICTION

Pursuant to Bankruptcy Act, Section 67 A, the "Court shall have summary jurisdiction of any proceeding by the Trustee or debtor as the case may be, to herein determine the right of any party under this subsection A." The power of the Bankruptcy Court to proceed summarily as to controversies over property rests largely upon whether or not the subject matter of the controversy is in its possession, either actual or constructive. (See Collier Bankruptcy Manual, Section 23.03 and Section 23.05) *Thompson v. Magnolia Petroleum Company*, 309 U.S. 478, 60 S.Ct. 628.

The record distinctly shows that the Bankruptcy Court determined, in the pre-trial proceedings, that it had jurisdiction to hear the cause to determine title. (R. 6, 185-7, lines 26) (The reporter's transcript from the Bankruptcy

Trial will be referred to herein as "R" and the clerk's transcript on appeal will be referred to herein as "C".) It also distinctly appears that at the trial, appellants/respondents herein asked for no ruling on the jurisdictional question, and although the Court suggested they could bring forth any fact they wished on that issue (R. 7, lines 5-22) they failed to do so.

From the above, the following is apparent: (1) the basic decision regarding jurisdiction had been made prior to trial; (2) no ruling on jurisdiction was requested at the trial; (3) the Court offered respondents herein an opportunity to produce evidence (the record does not reflect any such evidence or facts offered at the trial); and (4) no additional ruling on this issue was made or requested.

Specifically, a ruling on this question is not a part of the Findings of Fact or the Conclusions of Law. At no stage of the appellate proceedings did respondents designate, prepare, present or docket any of the pretrial proceedings or records thereon, as they may have dealt with the issue of jurisdiction.

The law on this point is clear. It provides that the rights of the parties to an appellate proceeding must be determined on the record before the appellate court. *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311, Reh.Den. 355 U.S. 967. The appellate court may not pass on questions not presented by the record, although decided by the trial court. *Lawn v. United States*, *supra*. *Standard-Vacuum Oil Company v. United States*, 339 U.S. 157, 70 S.Ct. 545. Matters which are simply included in or attached to the record without authority of law do not become a part of the record and cannot be considered by the appellate

courts. *Metropolitan R. Co. v. District of Columbia*, 195 U.S. 322, 70 S.Ct. 545.

Either "Easement A" was in the actual or constructive possession of the Bankruptcy Court or it was not. If it was, the Court then had the power fully to determine the title questions in summary proceedings. *Thompson v. Magnolia Petroleum Company*, 309 U.S. 478, 481; 60 S.Ct. 628 629, 84 L.Ed. 876. On the other hand, even if "Easement A" was not in the Court's actual or constructive possession and a third person asserted a claim adverse to the Trustee, "The mere assertion of an adverse claim does not oust the Court of Bankruptcy of its jurisdiction." *Harrison v. Chamberlain*, 271 U.S. 191, 194, 46 S.Ct. 467, 468. The Bankruptcy Court in such circumstance "has both the power and the duty to examine the claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial," (*Louisville Trust Company v. Comingor*, 184 U.S. 18, 25, 26; 22 S.Ct. 293, 296) and "the Bankruptcy Court has constructive possession and may exercise its jurisdiction over that property where the claim asserted is a mere pretense or is merely colorable." *In re Kirchoff Frozen Foods, Inc.*, 375 F.Supp. 156 (1972), citing 2 W.Collier, *Collier on Bankruptcy*, 23.05 (1) 14th Ed. (1971).

The burden was upon respondents to present the record of this pre-trial jurisdictional determination for review on the first appeal, but they failed to do so, even though the omission was pointed out to them by petitioner. (Item C. 82 No. 4, pages 27-29)

At the commencement of the trial, counsel for appellants/respondents herein briefly alluded to certain "funda-

mental procedural matters". The jurisdiction question was one of the matters then mentioned. Counsel for appellants stated:

"I am simply making it as clear as I can that by going forward . . . we are not in any way waiving our claim." (R. 5, lines 9-14)

Thereafter followed a discussion between the Court and counsel for respondents regarding jurisdiction—the preliminary portion of which is quoted by appellants/respondents in their brief before the United States Court of Appeals for the Ninth Circuit at pages 25-26, as follows:

"The Court: Well, we have already decided what we are going to do about that. Your point is well taken to put it on the record again. You are not waiving any rights. Everybody agrees to that. The fundamental question of jurisdiction is one matter that has to be determined along the way. The Court's basic feeling is that there is nothing essentially wrong with this thing here. The facts could change it. *Maybe you can give me some facts, or Mr. Yanowitz will at a later date . . . You are not asking me for a ruling right now?*

"*Mr. Mushrush: No, I am not asking you to make a ruling in regard to it. I want it to be clear that we see that as a problem in the case and we feel the burden of that problem is on the plaintiff.*" R. 7, lines 8-25) (Italicized material omitted by respondents)

Obviously, the Court "already decided" the jurisdictional question, and was saying that maybe some later facts might show the absence of title, possession or jurisdiction. Quite obviously, the later facts established the contrary, hence the judgment for petitioner. However, the record is clear that the jurisdictional question was decided by the Bank-

ruptcy Court in a pre-trial proceeding and was merely preserved at the time of trial.

In the absence of any record on appeal as to the basis of the Court's determination of the issue of jurisdiction, it is to be presumed (1) that the Court determined originally that it had actual or constructive possession of "Easement A" sufficient to determine title in the Bankruptcy Court or (2) that it had determined that the adverse claim was a mere pretense or merely colorable, and did not divest it of jurisdiction to proceed and determine the title question.

Petitioner's contention is that respondents have no standing in this Court to challenge the pre-trial jurisdictional determination of the Bankruptcy Court, having failed to docket the record at any stage of the appellate process. To do anything now, but assume a proper ruling on that issue, would be to honor omission and presume judicial error, in the absence of any record in favor of the party causing such absence.

The Ninth Circuit Court, in its Opinion, states the following at pages A-7 to A-8 of Appendix A:

"The first bridge we must cross is that of the appellant's challenge to the jurisdiction of the Bankruptcy Court to determine the validity of 'Easement A' as a valid and subsisting property right, title to which was vested in the bankrupt, Bel Marin Enterprises, Inc. and passed to the Trustee in Bankruptcy on the adjudication of the bankruptcy. *If the Bankruptcy Court has jurisdiction to pass on the issue, we would have no difficulty in affirming the judgment of the District Court.*" (Emphasis added)

The Court's opinion in this matter *and* counsel for appellants/respondents have relied heavily upon the decision in *Harrison v. Chamberlain*, 271 U.S. 191, 46 S.Ct. 467 (1926). The Court states in its opinion at page A-9 of Appendix A, the following:

"2. It is well settled that a Court of Bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the Bankruptcy estate, without the consent of the adverse claimant; but resort must be had by the Trustee to a plenary suit." *Harrison v. Chamberlain*, supra, at 193.

Mr. Justice Sanford also stated in the *Harrison* decision:

"However the Court (Bankruptcy) is *not* ousted of its jurisdiction by the *mere assertion of an adverse claim*; but having the power in the first instance to determine whether the adverse claim is real and substantial or merely colorable. If found to be merely colorable, *the Court may then proceed to adjudicate the merits summarily*; but if found to be real and substantial, it must decline to determine the merits and dismiss the summary proceeding (citations)" (emphasis added) supra, at p. 193.

In conclusion it is respectfully suggested that respondents herein have failed to docket any meaningful record on the issue of summary jurisdiction. In the absence of any adequate record it is urged by Petitioner that this Court presume summary jurisdiction by the Bankruptcy Court was proper in the light of the evidence submitted by Petitioner.

II. AS ACTUAL AND CONSTRUCTIVE POSSESSION OF "EASEMENT A" WAS WITH THE TRUSTEE IN BANKRUPTCY, JURISDICTION OVER THE RES, "EASEMENT A", PROPERLY ESTABLISHED JURISDICTION OF THE UNITED STATES BANKRUPTCY COURT.

CONSTRUCTIVE POSSESSION

The Bankruptcy Court, in fact, had constructive possession of the docks and of "Easement A" at the time of filing of the Bankruptcy Complaint on December 6, 1974, as the bankrupt had actual possession at that time. (C-1) The bankrupt, Bel Marin Enterprises, Inc., had actual possession for the following reasons:

1. The docks were physically located on "Easement A" as previously described;
2. Title to "The Gardens" was vested in the bankrupt at the time of filing and therefore, all incidents of use and title to The Gardens, such as "Easement A", would be included as the property of the bankrupt. *Page v. Edmonds*, 187 U.S. 596, 23 S.Ct. 200 (1903), *Chicago Board of Trade v. Johnson*, 264 U.S. 1, 44 S.Ct. 232 (1924).
3. A transfer of real property passes all easements attached thereto unless expressly excepted by terms of the deed. *California Civil Code*, Section 1104; *Bartholomae Corp. v. Scott Investment Company*, 119 C.A.2d 41 (1953). The bankrupt took title to the Gardens without any express exception of "Easement A", but in fact, made reference to the subdivision map of the property to which "Easement A" attaches. (Finding XV C-53, Finding XIX C-54) Furthermore, the law provides that "the transfer of a thing transfers all its incidents unless expressly excepted." *California Civil Code*, Section 1084.

ACTUAL POSSESSION

Actual possession of the docks and "Easement A" was in the Bankruptcy Court at the time of the filing of the Complaint on December 6, 1974 (C-1) for the following reasons:

1. The Trustee had been appointed at the time;
2. The docks were physically located on "Easement A";
3. The Trustee held title to The Gardens and all incidents thereto;
4. The Trustee received a deed from Mary Gouveia, the prior title holder, to "Easement A". (Finding XIX C-54, Conclusion XXXVII C-66). That deed was given to fully document the vesting of said "Easement A" in the Trustee in Bankruptcy for the benefit of the property of the bankrupt; namely, The Garden Townhouses.

Even in cases where possession is in a third person, the Bankruptcy Court still has summary jurisdiction if it appears that possession was wrongfully obtained or the property is held under a claim that is merely colorable. *Collier Bankruptcy Manual*, Section 23.03; *In re Carburetor Corporation*, 202 F.2d 75.

It is clear that the Bankruptcy Court had the power in the first instance to determine whether it had jurisdiction to proceed and hear the matter. *Matter of Tax Service Ass'n of Ill.*, 305 U.S. 160, 59 S.Ct. 131.

Having heard the cause and determined that right and title to "Easement A" existed in Lines, the Trustee in Bankruptcy, the prior determination of actual or constructive possession can hardly be disputed as unfounded on

the appeal. The Bankruptcy Court not only determined that it had a jurisdictional basis to determine the controversy about title, but also, in fact, determined the title question in favor of the Trustee in Bankruptcy.

As noted above, there are two basic sets of circumstances under which the Bankruptcy Court could have denied the motion to dismiss on jurisdictional grounds made during the pre-trial proceedings:

A. The Court could have concluded that it had actual or constructive possession of "Easement A"; or

B. The Court could have concluded that possession was in a third person who was asserting an adverse claim which was merely colorable.

As the pleadings, exhibits and record then before the Bankruptcy Court were not brought before the Ninth Circuit Court, the ruling must be presumed to have been correct unless shown to be clearly wrong. Further, if *either* ground is sufficient, it must be presumed that the Court acted on that ground, and not on any other ground.

The set of rules regarding the two situations—A and B above—are different; and they pivot upon the question of possession—is it in the bankrupt or a third person adverse claimant? If the possession is *in the bankrupt*—actual or constructive—there is no question but that the Bankruptcy Court has summary jurisdiction to determine title whether or not an adverse claim is substantial and requires weighing the credibility of witnesses. All rules regarding "colorability" of the adverse claim are irrelevant to the issue of summary jurisdiction based upon a determination by the Bankruptcy Court that the bankrupt had actual or constructive possession.

This is not to say that in a case where the Bankruptcy Court has summary jurisdiction based upon possession, that in determining title it may not have to decide close questions of fact, or the credibility of witnesses. It is only to say that in such a case, the uncertainty of evidence questions does not go to the right to summary jurisdiction based upon actual or constructive possession.

It appears that respondents are in great confusion on the subject of colorability: their whole argument assumes as a predicate either that the Court did not base its summary jurisdiction on actual or constructive possession and based it upon a determination of the "colorability" of adverse claim, or they have incorrectly assumed that the rules regarding "colorability" apply to a determination of summary jurisdiction based upon possession. Either assumption is, of course, incorrect. The reason it is uncertain which incorrect assumption respondents are following is that they seemed to have said both. The following incorrect statement of the law is made by them at page 34 (Appellants' Brief on Appeal in the United States Court of Appeals for the Ninth Circuit) as follows:

"Numerous courts have recognized that a third party claimant of property *in the hands of a trustee* in bankruptcy is entitled to a plenary action against the trustee to determine their respective rights in disputed property, and further, that the right to a jury trial shall be accorded whenever such determination involves issues cognizable at law." (R. 34, Li. 11-17) (Emphasis added)

The three cases cited by appellants to support this statement, *In re Baudouine* (2nd Cir., N.Y., 1900), 101 Fed. 574; *In re Russell* (2nd Cir., N.Y., 1900), 101 Fed. 248,

and *In re Wire Corporation of America* (N.N.Y., 1955), 131 F.Supp. 586, do not so hold. In the *Baudouine* and *Wire* cases, the property was NOT in the actual or constructive possession of the Bankruptcy Court, and the determination of summary jurisdiction was based upon a determination that the adverse claim was merely colorable. These determinations were held erroneous and summary jurisdiction thereon was reversed. In the third case cited, the *Russell* case, possession was in the bankruptcy and summary jurisdiction was upheld, regardless of the substantiality of the adverse claim.

As to the other incorrect assumption, Respondents at page 30-31 (Appellants' Brief on Appeal in the United States Court of Appeals for the Ninth Circuit) state the following:

"On a different but related point, it is doubtful that the trustee in this case had 'possession' of the subject property so as to confer jurisdiction on the bankruptcy court. As stated in the Summary of Facts, BMKCSO not only held title to the underlying fee, but also maintained the area (R.T. 503; 14-508:24), and the area was regularly used by the public for sailing (R.T. 508:5-6), fishing (R.T. 535:16-2:2 (sic) and picnicking (R.T. 538:19-26). In short, the property was in the *actual possession* of BMKCSO, and the activity of respondents in constructing boat docks in the area of Easement A constituted mere trespass rather than acts of possession." (emphasis in the original)

The trouble with this assertion, supposedly taken from their statement of facts, is that it is contrary to the Bankruptcy Court's Findings: (1) it fails to mention that the

Trustee was the owner in possession of the 30 Townhouse Apartments, and was the legal owner and occupier of all easements incident thereto, including "Easement A", (2) the bankrupt was in possession of the docks thereon, and (3) the Bankruptcy Court made findings expressly contradicting the "regular" use by the public for sailing, fishing, or picnicking. (See Findings 4, 5, 8, 11, 12, 13, 14, 15, 16, 17, 19, 21, 23, 24, 25, 28, 32, 34, 35, 36, 52, 54, 55, and 56, attached hereto as Appendix D.)

III. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MISAPPLIED THE FACTS TO THE LAW IN THIS CASE. THIS WILL RESULT IN NEEDLESS LITIGATION AND ADDITIONAL EXPENSE TO ALL THE PARTIES UNLESS THE DECISION IS REVERSED.

The Ninth Circuit Court in its Opinion has said at page A-11 of Appendix A:

"The appellant district, the conceded owner of lot 168, and conceded owner of at least a servient estate in alleged 'Easement A' has a possessory interest in the property that must be likened to the claim of the adverse claimant in *Harrison*."

The Court by this statement has shown that it is convinced that a mere assertion is likened to a substantial claim. This is contrary to the rule in *Harrison* that a mere assertion does not oust the court of jurisdiction. The Court confuses the issue of ownership and possession by the bankruptcy estate in contradistinction to ownership and possession by an adverse party. There is no dispute here that there was a donative conveyance by the predecessor in interest (West) to the bankrupt, Bel Marin Enterprises,

Inc., and title to lots 167 and 168 passed to District. What is clear, both in the words of the donative conveyance which are quoted in the opinion of the Court, and by subsequent resolution by the District, is that ownership of "Easement A" was reserved by West and passed to Bel Marin Enterprises, Inc. and therefore is in the ownership and possession of the Trustee in Bankruptcy.

Petitioners respectfully submit that the United States Court of Appeals for the Ninth Circuit has erred in its application of the law to the facts as presented to it on appeal. The following points warrant a reversal of the Ninth Circuit Opinion:

1. California Civil Code §1104 is clear on its face when it states "A transfer of real property passes all easements attached thereto."

2. District in accepting the donative conveyance did so by resolutions which made the acceptance subject to all existing easements. These facts are part of the record on appeal and are undisputed. Therefore, it is respectfully suggested that the law on the issue of "Easement A" is clear on its face and, contrary to the Court's opinion, does not have an "extremely complex legal and factual background." (P. A-18 of Appendix A) In fact, the issue of the ownership of "Easement A" is a very simple one. The easement was properly created at the time of the donative conveyance to District and was reserved by the bankrupt Bel Marin Enterprises, Inc.

3. The Bankruptcy Court correctly assumed jurisdiction pursuant to *Harrison* and found neither a colorable nor substantial adverse claim. This is so, because:

(a) the bankrupt was the legal owner of "Easement A",

(b) the bankrupt had not lost that title by adverse use or abandonment, and

(c) no evidence was shown the court to oust it of jurisdiction.

Unless the Findings of Fact and Conclusions of Law are clearly erroneous, the preliminary decision of the Bankruptcy Court that it possessed actual or constructive possession is positively sustained by the Findings of Fact and Conclusions of Law, which must be accepted if supported by evidence.

The Bankruptcy Court either determined it had sufficient possession for summary jurisdiction at the pre-trial proceedings or at the trial on that issue. If it was at the pre-trial, respondents have not docketed the record; if it was at the trial then the Findings of Fact control, unless clearly erroneous and unsupported. However, they are fully supported. In either case, the summary jurisdiction decision was correct in fact or presumptively.

CONCLUSION

The *results* of the Ninth Circuit opinion can be fairly characterized as follows:

1. Encouraging abuse of the judicial process, by allowing a mere unsubstantiated claim of lack of jurisdiction and by further allowing respondents to bootstrap a non-existent issue into a reversal of the District Court and the Bankruptcy Court decisions.

2. Denying the Bankruptcy Court the very authority it is given. Pursuant to the Bankruptcy Act, Section 67(a),

the "court shall have summary jurisdiction of any proceeding by the trustee or debtor as the case may be to hear and determine the rights of any party under this subsection (a)". The *power* of the Bankruptcy Court to proceed summarily as to controversies over property rests largely upon whether or not the subject matter of the controversy is in its possession either actual or constructive. As all of the evidence in the record supporting the Findings and Conclusions of the Bankruptcy Court shows that the Bankruptcy Court had actual and constructive possession of "Easement A", the decision by this Court would deny the Bankruptcy Court of any jurisdiction over any matter at any time by logical extension.

3. Denying access to a fair judicial determination, by reaching a decision which results in unnecessary litigation by remanding the case for determination by some other court. The evidence in the record indicates that the Petitioner will prevail, as respondents have no colorable or substantial claim. Therefore, it follows that unwarranted and unneeded expense for further litigation will result.

In conclusion, Petitioner asks that this Petition for Writ of Certiorari be granted and the Opinion No. 76-1982 of the United States Court of Appeals for the Ninth Circuit be reversed.

Dated, December 15, 1978.

Respectfully submitted,

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(Appendices Follow)

Appendices

APPENDIX A

United States Court of Appeals
Ninth Circuit

No. 76-1982

Bel Marin Keys Community Services District, a Public District of the State of California, O. W. Osterlund, S. A. Sharp, H. D. Lawson, George Shuleshko, Adeline D. Fox, Charles W. Fox, and Stig Rasmussen,

Appellants,

vs.

Bel-Marin Enterprises, Inc., a California corporation,

Kal W. Lines, Trustee in Bankruptcy,

Waterway Properties, Page Construction, Western Dock Enterprises, Robert Conway, Mary Gouveia, Duncan Haroldson, Inc., Does I through X, Inclusive,

Appellees.

[Filed August 10, 1978]

Appeal from the United States District Court
Northern District of California

OPINION

Before: KILKENNY, TRASK and SNEED, Circuit Judges.

KILKENNY, Circuit Judge:

This is an appeal from a judgment of the district court affirming the judgment of the bankruptcy court holding that the appellee trustee in bankruptcy was the owner of a waterfront easement with the right to install, construct, maintain, and operate docks on the easement, free and clear of any claim of the appellants, the public, or any other person or entity. The sole issue we consider is the jurisdiction of the bankruptcy court to decide the question of the existence of the easement, if any, known to the record as *Easement A*.

PROCEDURAL BACKGROUND

The litigation originated in the Superior Court of the State of California for the County of Marin on January 25, 1974. The appellants, later named as defendants in the proceeding in the bankruptcy court, filed an action against appellees where they sought a temporary and permanent injunction restraining the appellees from proceeding with the construction of docks, the installation of pilings, piers, or other permanent fixtures on Lot 168 and other relief. Additionally, the complaint alleged that appellant Bel Marin Keys Community Services District [District] was the owner of Lot 168 on which a lagoon was created, and shown upon a certain map entitled "Bel-Marine Keys, Unit No. 2 in the County of Marin, California", filed July 27, 1964, in Book 12 of Maps, Page 87, Marin County Records; that named individual appellants were owners and inhabitants of improved residential real property within the ap-

pellant District fronting on said lagoon and adjacent to said Lot 168; that without right or authority, the appellees encroached on the said Lot 168 and lagoon attempting the construction of the docks and piers previously mentioned.

In addition to the restraining order appellants requested a declaration that the docks constituted a public and private nuisance and an order that a public and private right of access existed for use and enjoyment of the entire lagoon area. On the day the complaint was filed, the state court issued a temporary restraining order halting further dock construction.

In September, 1974, Bel-Marine Enterprises, Inc. was adjudicated a bankrupt and appellee, Lines, was appointed as its trustee. On December 6, 1974, the trustee filed suit in bankruptcy court against those who had sought the injunction in state court. His complaint charged that as owner of the 30 lots constituting "The Gardens" apartments he was also owner of *Easement A* adjacent to the apartments which extended over the lagoon area of Lot 168 owned by the District. As rightful owner of this easement, the trustee alleged that he was entitled to construct and maintain docks on the easement free from any claim of the appellants or the public. Appellants filed an answer denying that the trustee had colorable or any title to the subject property and denying that the bankruptcy court had jurisdiction to hear the controversy.

After a trial, the bankruptcy court entered findings of fact and conclusions of law reciting that: (1) it had jurisdiction; (2) that there was no merit to the causes of action

alleged in the appellants' state court action; (3) that the injunction and restraining order in the state court proceeding constituted a cloud upon the *title of the trustee* [Emphasis Supplied]; (4) that the trustee was the owner of *Easement A* free and clear of any claims of public or private persons; (5) that the trustee had the right to install and operate docks on the easement free from interference.

The decision of the bankruptcy court was appealed to the United States District Court for the Northern District of California. From the summary judgment of the district court affirming the decision of the bankruptcy court, this appeal is prosecuted.

FACTUAL BACKGROUND

Before us is a land development project originated by Jack West, Jr. and his wife [West] pursuant to a number of approved subdivisions and subdivision maps and plans, two of which are directly involved in this litigation: "The Gardens" at Bel Marin Keys and Bel-Marine Keys Unit 2. As part of the development of this boat oriented community, a man-made lagoon was created. Lot 168 of the development underlay this lagoon. The subdivision plans for "The Gardens" provided for the creation of 30 apartment units. The first plans for this subdivision were filed on the 23rd day of December, 1963, in Volume 12 of Maps at page 52.

On March 11, 1964, West executed and delivered to Eureka Auxiliary Corporation, as trustee, and Eureka Federal Savings & Loan of San Francisco, as beneficiary, a deed of trust and assignment of rents for the 30 lots making up "The Gardens" apartments to secure the pay-

ment of the sum of \$20,000.00. This deed of trust was recorded on March 12, 1964.

On July 27, 1964, West filed and recorded a map entitled, "Bel-Marine Keys, Unit No. 2, in the County of Marin, California." This map conformed to all California state legal requirements and contained the following declaration by West in the Owners Certificate.

"We hereby establish an exclusive private easement as follows: That portion of the area designated as 'private boat docking, storage and anchorage easement' and lying within the prolongation of the sideline of each lot shown hereon is hereby established as an exclusive private easement for boat docking, storage and anchorage purposes for the sole and exclusive use of the owner of such lot.

"We hereby reserve 'Easement A' as an exclusive easement for private boat docking, storage and anchorage purposes for the exclusive use of the owners of record of Lots 1 to 30 inclusive of 'The Gardens' as recorded in Volume 12 of Maps, Page 52, records of Marin County.

"We also hereby certify that the subscribers of this statement are all those having any record title interest in the land shown on this map." [Emphasis supplied.]

West was still the owner of Lots 1 to 30, inclusive, of "The Gardens" when the owners declaration was filed. This document was recorded in Volume 12 of Maps, Page 87, of the Records of Marin County, California, on the 27th day of July, 1964. It consists of seven sheets of maps as well as a detailed metes and bounds description of *Easement A*; *Easement A* being further identified on page 7 by the following language:

"Exclusive Easement for private boat docking, storage and anchorage purposes for the exclusive use of the owners of record of Lots 1 to 30 inclusive of 'The Gardens' as recorded in Volume 12 of Maps, page 52."

Subsequently, on January 3, 1966, West executed and delivered a donative conveyance by deed of Lots 167 and 168, the lagoon lots, to the District. This deed contained a description of the property conveyed, with the following reservation:

"RESERVING therefrom a private exclusive easement for private boatdocking, storage and anchorage purposes, over, across, upon and under those portions of those certain 20 foot private boatdocking, storage and anchorage easements' lying within the prolongation of the lot sidelines of Lot 167, as shown on that certain map entitled 'Map of Bel Marin Keys, Unit 1-A, in the County of Marin, California', filed January 14, 1963 in Book 11 of Maps at page 58, Marin County Records, and Lot 168, as shown upon that certain map entitled 'Bel Marin Keys, Unit No. 2, in the County of Marin, California', filed July 27, 1964 in Book 12 of Maps at page 87, Marin County Records." [Emphasis supplied.]

The District subsequently passed two resolutions accepting the donative deed of Lots 167 and 168. Both resolutions of acceptance contained the words "Subject to all existing easements of record.", but did not mention questioned "Easement A."

Subsequently, on May 10, 1967, West, for the first time, conveyed title to Lots 1 through 30, inclusive, to appellants Title & Trust Company, a California corporation, the predecessor in interest of the bankrupt and the trustee in bankruptcy. The description of the property was as follows:

¹The 20 foot easement is not here involved.

"PARCEL 1

Lots 1 through 30, inclusive, as said Lots are shown upon that certain Map entitled, 'The Gardens' at Bel-Marine Keys, in the County of Marin, California, filed December 23, 1963, in Book 12 of Maps at page 52, Marin County Records."

It is observed that this conveyance made no reference to Easement A as shown on the map filed July 27, 1964. Subsequently, on February 21, 1968, West conveyed three additional parcels of property to Title Insurance & Trust Company without mentioning *Easement A*. These deeds do mention *Parcel A*, a reservation the record first notes on a map recorded on December 23, 1963.² However, the precise boundaries of *Parcel A* are not recorded on the map, and appellees have made no claim that *Parcel A* may be used for boat dock construction.

DISCUSSION

The first bridge we must cross is that of the appellants' challenge to the jurisdiction of the bankruptcy court to determine the validity of *Easement A* as a valid and subsisting property right, title to which was vested in the bank-

²"The area shown upon said map as 'Parcel A' is hereby set aside for the joint and common use of the owners of the lots shown on said map. Upon conveyance of any lot shown upon said map, there shall also be conveyed to the grantee of said lot an undivided interest in said 'Parcel A' for the following purposes:

1. That portion of 'Parcel A' lying between the street line and the broken line designated 'Use Line' to be used for access, parking and utility purposes only;
2. That portion of 'Parcel A' lying to the rear of the broken line designated 'Use Line' to be used for recreation purposes only.

'Parcel A' shall be kept open and free from buildings and structures of any kind, provided that structures and buildings intended solely for the joint and common recreational use by the owners of lots in said subdivision may be constructed in that portion of 'Parcel A' lying to the rear of the 'Use Line.'" [Emphasis supplied.]

rupt Bel-Marin Enterprises, Inc., and passed to the trustee in bankruptcy upon the adjudication of bankruptcy. If the bankruptcy court had jurisdiction to pass on the issue, we would have no difficulty in affirming the judgment of the district court. The collateral issues raised by appellants would then be foreclosed by the findings of the bankruptcy court. If, however, the bankruptcy court was without jurisdiction, the judgment of the district court must be vacated and the cause remanded with directions.

Both the facts in the record touching upon the existence of *Easement A* and the California law on easements are exceptionally complex. For that matter, neither side claims that the California courts have passed on important questions essential to the validity of the purported *Easement A*. For example, (1) whether an easement can be created on property where there is no outright grant; (2) whether an easement can be created where the grantor is the owner of both the dominant and servient estates at the time of the purported creation;³ and (3) whether the failure to mention *Easement A* in any of the subsequent conveyances might have kept Lot 168 clear of the encumbrance. Manifestly, on this record the bankruptcy court was confronted with a record presenting unresolved issues of California real property law and significant issues of fact.

As early as 1925, our Supreme Court in the leading case of *Harrison v. Chamberlin*, 271 U.S. 191 (1926), offered spe-

³California law may be read to prohibit an owner from creating an easement in his own land.

"§ 805. *Persons who cannot hold servitudes.*

BY WHOM HELD. A servitude thereon cannot be held by the owner of the servient tenement."

Leggio v. Hagerty, 231 Cal.App.2d 873, 42 Cal.Rptr. 400 (1965).

Cal. Civ. Code § 805 (West).

cific guidelines for determining when a bankruptcy court may exercise jurisdiction where an adverse claim to property had been asserted. There, in distinguishing between a controversy arising in a bankruptcy proceeding and one arising in an administrative proceeding in bankruptcy, Mr. Justice Sanford said:

"2. It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; *but resort must be had by the trustee to a plenary suit.*" *Id.* at 193. [Emphasis supplied.]

Noting that the bankruptcy court was not ousted of its jurisdiction by the mere assertion of an adverse claim, the Court restated the rule that a bankruptcy court, in the first instance, had authority to determine whether it had jurisdiction to proceed and to "enter upon a preliminary inquiry to determine whether the adverse claim is *real and substantial or merely colorable.* And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding." *Id.* at 194. [Emphasis supplied.]

The *Harrison* Court adopted the rule that a claim is to be deemed of a substantial character when the claimant's contention

"discloses a contested matter of right, involving some fair doubt and reasonable room for controversy' [case citations], in matters *either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insuffi-*

cient, either in fact or law, as to be plainly without color or merit, and a mere pretense." *Id.* at 195. [Emphasis supplied.]

Justice Sanford concluded his opinion with the following observation:

"In the present case it clearly appears that the validity of the respondent's claim depended upon disputed facts, as to which there was a conflict of evidence, as well as a controversy in matter of law. Its determination involved 'fair doubt and reasonable room for controversy' both as to fact and law. It was therefore substantial, and not merely colorable; and its merits could only be adjudged in a plenary suit." *Id.* at 195. [Emphasis supplied.]

Earlier, in *Cline v. Kaplan*, 323 U.S. 97 (1944), the Supreme Court said:

"Once it is established that the claim is not colorable nor frivolous, the claimant *has the right* to have the merits of his claim passed on in a plenary suit and not summarily. Of such claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court." *Id.* at 99. [Emphasis supplied.]

Here we have a situation distinctly akin to the one involved in *Suhl v. Bumb*, 348 F.2d 869 (CA9 1965); *cert. denied* 382 U.S. 938, where the court said:

"The power of a bankruptcy court to resolve adverse claims concerning the assets of the bankrupt's estate is indeed a power of imposing magnitude. *Since it results in depriving claimants of a plenary suit, we must ever be cautious lest we permit its extension to a situation that should not permit summary disposition.*" *Id.* at 871. [Emphasis supplied.]

The trial before the referee was an extensive one. His findings of fact and conclusions of law cover 18 typewritten legal size pages. He concluded that the trustee was entitled to the title and possession of *Easement A*.

We conclude that the legal principles enunciated in *Harrison* should be applied to this extremely complex legal and factual background. It must be conceded that the appellant District has a substantial right of possession under its servient estate even though *Easement A*, under California law, might eventually be declared valid. The appellee has presented no evidence showing a direct grant of *Easement A* to the bankrupt or its predecessors in interest. The appellant District, the conceded owner of Lot 168, and the conceded owner of at least a servient estate in alleged *Easement A* has a possessory interest in the property⁴ that must be likened to the claim of the adverse claimant in *Harrison*. Here, as in *Harrison*, the appellant District's claim to the property must be deemed substantial. It is not so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit. It amounts to more than a mere pretense. *Harrison v. Chamberlin, supra*, at 195.

⁴§ 810. *Owner of servient tenement; possessory action*

ACTIONS BY OWNER OF SERVIENT TENEMENT. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public." Cal. Civ. Code (West).

CONCLUSION

The referee's findings of fact and conclusions of law that he had jurisdiction to proceed in a summary manner are clearly erroneous.

The judgment of the district court is vacated and the cause is returned for a remand to the bankruptcy court with directions to dismiss the proceeding for want of jurisdiction. If the trustee so desires, he may institute a plenary action in the district court or, in his discretion, await the decision of the California court on the issues presented in the litigation there pending. If a plenary action is started in the district court, the court may consider abstaining from deciding this difficult question of California easement law pending decision of the California court.

APPENDIX B

United States Court of Appeals
Ninth Circuit

No. 76-1982

Bel Marin Keys Community Services District, a Public District of the State of California, O. W. Osterlund, S. A. Sharp, H. D. Lawson, George Shuleshko, Adeline D. Fox, Charles W. Fox, and Stig Rasmussen,

Appellants,

vs.

Bel-Marin Enterprises, Inc., a California corporation,
Kal W. Lines, Trustee in Bankruptcy,
Waterway Properties, Page Construction,
Western Dock Enterprises, Robert Conway, Mary Gouveia, Duncan Haroldson, Inc., Does I through X, Inclusive,

Appellees.

[Filed September 21, 1978]

Appeal from the United States District Court
Northern District of California

ORDER

Before: KILKENNY, TRASK and SNEED, Circuit Judges.

Appellees' petition for rehearing is denied.

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(415) 673-2133

Attorneys for Respondents
and Cross-Defendants

United States District Court
Northern District of California

Bel-Marin Enterprises, Inc., a California
corporation,
Kal W. Lines, Trustee in Bankruptcy,
Plaintiff, Cross-defendant
and Respondent,
vs.

Bel Marin Keys Community Services Dis-
trict, a Public District of the State of
California, O. W. Osterlund, S. A. Sharp,
H. D. Lawson, George Shuleshko, Ade-
line D. Fox, Charles W. Fox, and Stig
Rasmussen,
Defendants, Cross-complain-
ants and Appellants.

Waterway Properties; Page Construction;
Western Dock Enterprises; Robert Con-
way; Mary Gouveia; Duncan Haroldson,
Inc.; Does I through X, inclusive,
Other Cross-defendants
and Respondents.

Civil No.
C 76 175 RHS

Bankruptcy
No. 1-74-683

[Filed March 29, 1976]

ORDER AFFIRMING JUDGMENT

Notice of Appeal to this Court having been filed by Ap-
pellants BEL MARIN KEYS COMMUNITY SERVICES
DISTRICT, a Public District of the State of California,
O. W. OSTERLUND, S. A. SHARP, H. D. LAWSON,
GEORGE SHULESKO, ADELINE D. FOX, CHARLES
W. FOX, and STIG RASMUSSEN, on August 7, 1975; the
matter having been fully briefed by all parties and oral
argument having been held before this Court on March 26,
1976, attorney ALBERT BIANCHI appearing on behalf
of Appellants, and attorneys JOSEPH A. FOREST and
WILLIAM KELLY appearing on behalf of Respondents,
and it having been found to the satisfaction of this Court
that the Order of the Bankruptcy Judge made on January
21, 1975 and the Judgment entered in favor of Plaintiffs
and Cross-Defendant KAL W. LINES on July 31, 1975 to
be fully proper in accordance with law;

IT IS ORDERED that the Order of the Bankruptcy
Judge made on January 21, 1975 and the Judgment entered
in favor of plaintiffs and Cross-Defendant KAL W. LINES
on July 31, 1975 are hereby affirmed.

Dated: March 29, 1976

/s/ ROBERT H. SCHNACKE

ROBERT H. SCHNACKE, Judge
United States District Court

NOTICE

In accordance with LR 124 (c) costs
will be taxed in accordance with the
bill of costs unless objections are
filed.

Entered in Civil Docket March 30, 1976.

Carrow, Applen & Forest
1450 Grant Avenue
Novato, Ca. 94947
(415) 897-2101

United States District Court
Northern District of California

Bankruptcy

No. 1-74-683

In re the Matter of
Bel-Marin Enterprises, Inc., a California
corporation,

Bankrupt,

Kal W. Lines, Trustee,

Plaintiff,

vs.

Bel Marin Community Services District,
etc., et al.,

Defendants.

Bel Marin Keys Community Services Dis-
trict, a public district of the State of
California, O. W. Osterlund, S. A. Sharp,
H. D. Lawson, George Shuleshko, Ade-
line D. Fox, Charles W. Fox and Stig
Rasmussen,

Cross-Claimants,

vs.

Kal W. Lines, Trustee in Bankruptcy of
the estate of Bel-Marin Enterprises,
Inc., a California corporation; Water-
way Properties, Page Construction,
Western Dock Enterprises, Robert Con-
way, Mary Gouveia, Duncan Haroldson,
Inc., Does I through X, inclusive,

Cross-Defendants.

[Filed July 31, 1975]

JUDGMENT

This cause came on regularly for trial in the above-entitled Court on April 22, 23, 24 and 25, 1975, the Honorable Conley Brown, Judge, Presiding, sitting without a jury. Plaintiff and Cross-Defendants represented by CARROW, APPLIN & FOREST by Joseph A. Forest, and William Kelly, and defendant and Cross-Complainant appearing by BIANCHI, HOSKINS & ROSENBERG and Raymond Mushrush, and evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision, and the Court having made and caused to be filed its written Findings of Facts and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED:

1. The plaintiff, KAL W. LINES, Trustee in Bankruptcy of the estate of Bel-Marin Enterprises, Inc., a California corporation, is the owner of Easement A, free and clear of any claim of the defendants or any of them and free and clear of any claim of the public or of any other person or entity.

2. That plaintiff has the right to install, construct, maintain and operate docks on Easement A free of interference from defendants or any of them or interference from any other party.

3. That the allegations, claims and contentions set forth in the Cross-Claim of defendants herein are untrue, without basis and merit.

4. That defendants and each of them are not entitled to an injunction, restraining order or stay of the installation, construction, maintenance or operation of docks by

plaintiffs or any successor in interest of plaintiff in docks built upon Easement A.

5. That defendants, and each of them, be and are enjoined from performing any act in any way interfering with plaintiff's ownership, possession or use of Easement A or the installation, construction, maintenance or operation of docks upon Easement A or of any use incidental thereto and that all agents, employees, officers, directors, servants and associates of defendants be similarly enjoined, restrained and prevented from taking any such action.

6. Plaintiff has the right to construct docks upon said Easement A, without obtaining an encroachment permit or any other permit from defendant District or from any other public body and to convey the right to use said docks to any purchaser of property owned by plaintiff in the vicinity of Easement A, or to convey such rights in any similar matter as may be ordered or approved by this Court.

Dated: July 31, 1975

/s/ Conley Brown
Judge Conley Brown
Bankruptcy Judge

Appendix C

Chapter II

COURTS OF BANKRUPTCY

Sec. 2. (11 U.S.C. § 11.) Creation of Courts of Bankruptcy and Their Jurisdiction

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this Act;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(2A) Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed,

which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

(4) Arraign, try, and punish persons for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow

such officers additional compensation for such services, as provided in section 48 of this Act;

(6) Bring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property in any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;

(9) Confirm or reject arrangements or plans proposed under this Act, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings and cases;

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;

(13) Enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

(16) Punish persons for contempts committed before referees;

(17) Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;

(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this Act;

(19) Transfer cases to other courts of bankruptcy;

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction;

(21) Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required, except in proceedings under section 77 and chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of

bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive; and

(22) Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.

b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

APPENDIX D

Carrow, Applen & Forest
1450 Grant Avenue
Novato, CA 94947
(415) 897-2101

United States District Court
Northern District of California

Bankruptcy No. 1-74-683

In re the Matter of
Bel-Marin Enterprises, Inc., a California
corporation,

Bankrupt,

Kal W. Lines, Trustee,

Plaintiff,

vs.

Bel Marin Community Services District,
etc., et al.,

Defendants.

Bel Marin Keys Community Services Dis-
trict, a Public District of the State of
California, O. W. Osterlund, S. A. Sharp,
H. D. Lawson, George Shuleshko, Ade-
line D. Fox, Charles W. Fox and Stig
Rasmussen,

Cross-claimants,

vs.

Kal W. Lines, Trustee in Bankruptcy of
the estate of Bel-Marin Enterprises, Inc.,
a California corporation; Waterway
Properties, Page Construction, Western
Dock Enterprises, Robert Conway, Mary
Gouveia, Duncan Haroldson, Inc., Does
I through X, inclusive,

Cross-defendants.

[Filed July 31, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause [as framed by (1) the complaint for declaratory relief filed by Trustee Kal W. Lines, (2) the answer to said complaint filed by the District (Bel Marin Keys Community Services District) and named individual homeowners, (3) the cross-complaint and the answer filed to said cross-complaint] came before the Court and was heard by the Court, sitting without a jury, on 22nd, 23rd, 24th and 25th of April, 1975. Plaintiff and cross-defendants were represented by CARROW, APPLIN & FOREST, by Joseph A. Forest, and William Kelly. Defendants and cross-complainants were represented by BIANCHI, HOSKINS AND ROSENBERG, by Albert Bianchi, Gary Oswald and Raymond Mushrush. Witnesses were sworn and examined and documentary evidence was introduced by the respective parties. Before and after the evidence was closed, trial briefs and written arguments were submitted to the Court. The cause was submitted for decision, and after deliberation thereon, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I

Bel Marin Keys was a land development conducted by Jack West, Jr., under and pursuant to various approved subdivisions and subdivision maps and plans, two of which are directly involved in this lawsuit: The Gardens at Bel Marin Keys and Bel Marin Keys Unit No. 2.

II

As part of the development of a boat-oriented community in Bel Marin Keys, a man-made lagoon, connected to the

Novato River, was permitted to be created and was created. Lots 167 and 168 of the development underlay this lagoon.

III

The subdivision plans for the Gardens provided for the creation of thirty apartment units as one parcel in the development. The first tentative plans for this subdivision, as filed in 1963 with the County of Marin, depict an "Easement A" in the lagoon to be created, as reserved for boat docking for the owners of the Gardens.

IV

The final subdivision plans approved and recorded on July 27, 1964, for Bel Marin Keys Unit No. 2 depicts and refers to "Easement A" as being reserved for boat docking for the owners of the Gardens. This easement was described on page 1 of this Map (Ex. 1) as follows:

"An exclusive easement for private boat docking, storage and anchorage purposes for the exclusive use of the owners of record of lots 1-30 of the Gardens."

This "Easement A", in its measurements and design, was further depicted on pages 2 and 7 of this Map overlying a part of Lot 168.

V

The CC&Rs recorded for this subdivision under "E" stated:

"1. Easements affecting all lots in said tract are reserved as shown on the recorded plat, for utility installation and maintenance and other purposes as specified." (Ex. 3)

The CC&Rs also provided that the covenants and restrictions of the CC&Rs were to run with the land and be binding upon all persons claiming under them until 1984.

VI

In creating the lagoon, the area where "Easement A" was located was specially recessed, and this was the only area so recessed within the lagoon proper. This recessed area was created by the cut and fill and dredging which created the lagoon itself, as shown on various photographs received in evidence.

VII

This recessed area where "Easement A" was located was also left free and clear of any home pads, and the easement extended over a part of the land lying between the lagoon and Bel Marin Keys Blvd.

VIII

Because of the findings expressed in III, IV, V, VI, VII and VIII above, this Court concludes as a finding of fact that it was always the intention of the developer to provide "Easement A" in the lagoon for boat docking for the owners of the Gardens apartments. It is further found that this intention was communicated and manifested to the County of Marin, and by them considered in approving the creation of the lagoon, and in approving each of the related subdivision maps and plans.

IX

On 12 March 1964 Jack West, Jr., recorded 30 deeds of trust on the Gardens apartments in favor of Eureka Fed-

eral Savings & Loan Association. At this time Jack West still owned legal title to Lots 167 and 168.

X

On July 27, 1964, Jack West recorded the final approved Map for Bel Marin Keys Unit No. 2, still owning the legal title to Lots 167 and 168.

XI

On January 3, 1966, Jack West, Jr. made a donative conveyance by deed of Lots 167 and 168 to Bel Marin Keys Community Services District (the District or BMKCSD). This deed described Lots 167 and 168 by reference to the recorded subdivision Map for Bel Marin Keys Unit No. 2, as follows:

"Lot 167, as shown on that certain map entitled 'Map of Bel Marin Keys, Unit 1-A, in the County of Marin, California', filed January 14, 1963 in Book 11 of Maps at page 58, Marin County Records.

Lot 168, as shown upon that certain map entitled 'Bel Marin Keys, Unit No. 2 in the County of Marin, California, filed July 27, 1964 in Book 12 of Maps at page 87, Marin County Records.

RESERVING therefrom a private exclusive easement for private boat docking, storage and anchorage purposes, over, across, upon and under those portions of those certain 20 foot private boat docking, storage and anchorage easements lying within the prolongation of the lot sidelines of Lot 168, as shown on that certain map entitled 'Map of Bel Marin Keys, Unit 1-A, in the County of Marin, California', filed January 14, 1963 in Book 11 of Maps at page 58, Marin County Records, and Lot 168, as shown upon that certain map

entitled, 'Bel Marin Keys, Unit No. 2, in the County of Marin, California', filed July 27, 1964 in Book 12 of Maps at page 87, Marin County Records.

SAID easements so reserved are to be appurtenant to the grantors remaining lands or any lands within said herein mentioned subdivisions that the grantor(s) may acquire in the future."

The Court further finds the 20 foot private docking easement does not affect and is not within "Easement A" and the reservation concerning that private 20 foot "Easement A" does not affect this lawsuit.

XII

It was the intention of Jack West, Jr., in so describing the lots conveyed to directly make them subject to "Easement A" as recorded on that Map, and incorporate the recorded Map for Bel Marin Keys Unit No. 2 into the very deeds conveying Lots 167 and 168 to BMKCSD.

XIII

The deed conveying Lots 167 and 168 to BMKCSD incorporated, as part of the deed itself, the recorded Map for Bel Marin Keys Unit No. 2, depicting and describing "Easement A".

XIV

BMKCSD passed two resolutions of acceptance regarding the donative deed of Lots 167 and 168 from Jack West, Jr. The first such resolution was on 14 January 1966, the second was in June of the same year. Both these resolutions of acceptance added the words "Subject to all existing easements of record", which were not in the deeds themselves.

XV

The Court finds that by the offer and acceptance the District had full and complete notice and knowledge of the fact that "Easement A" had been and was reserved for boat docking for the owners of the Garden apartments, and that Lot 168 received by them was "subject to" "Easement A".

XVI

BMKCSD, and its members, agents and employees, all had actual and/or constructive notice and knowledge of the existence of "Easement A", and the possibility that the owners of the Garden apartments could and might build docks thereon ever since the recording of the Map for Unit No. 2, if not before.

XVII

The individual homeowner defendants also had constructive notice of the existence of "Easement A" from the time of the recording of the Map for Unit No. 2, which was well before any of them acquired property in Bel Marin Keys.

XVIII

There was a custom and practice of informing prospective buyers in the development that "Easement A" existed for the owners of the Garden apartments as evidenced by the testimony of several witness. There was also a large wall drawing showing said "Easement A" kept in the sales offices handling the sales of property within Bel Marin Keys, and the attention of buyers was directed to this drawing.

XIX

Legal title to the Garden apartments went through various mesne conveyances from Eureka and Jack West, Jr. until it was held by Mary Gouveia. While these transfers did not specifically refer to or describe "Easement A", each of these transfers carried "Easement A" by operation of California Law, whether it be the Subdivision Map Act, the statutory and general law regarding subdivisions, CC 1104 or the offer and acceptance of Lots 167 and 168 by BMKCSD, as aforesaid.

XX

Because of various problems in maintaining the Lagoon, the tax rate of all homeowners in the BMKCSD was increased from \$1.25 to \$3.00. Although Mr. Mikkelsen, the then owner of the Garden apartments, protested this assessment at a meeting of the BMKCSD held on 12 November 1971, he was informed publicly by the then director of the CSD, Mr. Ben Kump, that since he had a right to build docks for the benefit of the Gardens, he would be subject to the increased tax assessment.

XXI

On 24 August 1973, Western Dock Enterprises prepared a drawing for a proposed dock to be built on "Easement A" for the then owner of the Garden apartments, Mary Gouveia. This plan was submitted to, and approved by, the "Architectural Committee" as required by the CC&Rs for Bel Marin Keys Unit No. 2. The signature of Jack West, the head of said committee, appears thereon.

XXII

The approved drawings for these docks were shown to Mr. Aubel, one of the directors of BMKCSD, and others at one of the meetings of the BMKCSD. There were no objections presented against these plans at this time. This was all before any construction was commenced.

XXIII

The plans for the docks show that they are so placed within "Easement A" as to provide for the maximum fairway on the east side of "Easement A".

XXIV

There was uncontradicted testimony from Myron L. Shorter that the fairway allowed by said docks exceeded the requirements of the Coast Guard "Guidelines" (Received in evidence), exceeded or amply met standards used elsewhere in the local building of boat docking and marinas, and the Court so finds.

XXV

The BMKCSD, by Mr. Aubel, made statements before any construction was commenced on the docks, that the BMKCSD had no jurisdiction over "Easement A".

XXVII

Mr. Shorter testified, and it was uncontradicted, that one week before the start of construction he phoned Mr. Aubel and asked if there was any change in the legal position of CSD and was informed that there was no change.

XXVIII

On December 17, 1973 the Planning Department of the County of Marin approved the plans and specifications for the proposed docks to be constructed within "Easement A".

XXIX

No EIR report was requested, and there was the uncontradicted testimony that the plan for the dock had been approved in principle before the operation of the applicable California Environmental Quality Act, and the Planning Department concluded that to require an EIR would be to give the act retrospective application.

XXX

There was also uncontradicted testimony that the issuance of a building permit for the docks was a ministerial act and the Court so finds.

XXXI

On January 1, 1974, the Marin County Department of Public Works issued a building permit for the construction of the dock within "Easement A".

XXXII

Construction of the dock was commenced on January 24, 1974, by Western Dock Enterprises and Page Construction. This construction was enjoined on 25 January 1974 by the Superior Court of the County of Marin, pursuant to a complaint filed by the District.

XXXIII

As amended complaint adding the private homeowner parties as plaintiffs (defendants in this Court) set forth the asserted grounds for enjoining the building of the docks in eight causes of action.

XXXIV

The allegations of Paragraphs I, II, III, IV, V, VI, VII and VIII of the complaint for declaratory relief herein by the Trustee Kal W. Lines are true and correct.

XXXV

The allegations of Paragraphs I, II, III, IV, VII, IX and X of the First Cause of Action in the Cross-Complaint are true and correct insofar as they are admitted by the answers filed to said Cross-Complaint.

XXXVI

The Court finds that the existence of the Superior Court Action and injunction constitutes a cloud upon the title of the Trustee Kal W. Lines as alleged in Paragraph VII of the Complaint for declaratory relief, and that it interferes with the administration of this estate by this Court.

The Court further makes the following additional specific findings of fact in reference to each of the causes of action alleged in said state complaint as follows:

FIRST CAUSE OF ACTION—PURPRESTURE

XXXVII

The "lagoon" at Bel Marin Keys is a body of water "navigable" in fact, and was created pursuant to plans

and permits of the County of Marin and the State of California.

XXXVIII

The docks constructed and planned to be constructed for the Garden apartments (now Townhouse Apartments) on "Easement A" were and are an authorized use of the soil underlying the waters of the lagoon, in that said docks were built pursuant to plans approved by the County of Marin and the Architectural Committee of Bel Marin Keys.

XXXIV

The docks constructed and to be constructed on "Easement A" do not constitute an obstruction of private or public waters. This same conclusion was also appropriately reached by the County of Marin through the approval of the subdivision Map for Bel Marin Keys Unit No. 2, and the approval of the plans for the building of docks.

XXXX

The said docks do not constitute a public nuisance, nor purpresture as there is no unlawful obstruction of navigable waters.

XXXXI

There is no private nuisance arising from said docks as said docks do not constitute an unlawful obstruction of navigable waters, and they are approved by the County of Marin.

XXXXII

Each and all of the private homeowner defendants acquired their property with notice and knowledge—actual and/or constructive—of the existence of "Easement A" and the fact that the owners of the Gardens had the right to build docks thereon.

SECOND CAUSE OF ACTION—BLOCKING
VIEW AND ACCESS

XXXXIII

The rights of view and access which each of the individual homeowner defendants acquired with their property were subject to the existence of "Easement A" and its use by the owners of the Gardens for boat docks.

XXXXIV

The said docks as designed and constructed constitute a proper, fair and reasonable use of "Easement A", well within legal and factual norms involved in the use of said easement and the requirements for dock building.

XXXXV

The said docks are well within the docking Guidelines of the State of California and the access provided in marinas in the local area. Said docks conform with the view and access acquired by said homeowner defendants at the time when they acquired their property. Moreover, any impairment of viewer access created by said docks was of the nature and within what the homeowner defendants knew or should have known what would come about when they acquired their property.

THIRD CAUSE OF ACTION—FAILURE TO OBTAIN A PERMIT

XXXXVI

BMKCSD is the legal owner of Lots 167 and 168 which underlay the lagoon at Bel Marin Keys.

XXXXVII

Ordinance No. 1 was enacted by BMKCSD after acquiring the lagoon lots, and relates to the need to obtain permits for certain activities within the lagoon.

XXXXVIII

The owners of the Gardens and the builders of the dock did not obtain a permit from the BMKCSD to build said docks.

XXXXIX

There was no obligation nor necessity for the owners and builders of the docks to obtain a permit from the BMKCSD for the building of said docks, and therefore, their failure to obtain one is without factual or legal bearing on this lawsuit.

L

BMKCSD is a subordinate political structure to a County. Ordinance No. 1 purports to declare a misdemeanor and provides for imprisonment in a county jail for not more than six months or a fine for not more than \$500 for violations.

FOURTH CAUSE OF ACTION— EASEMENT BY PRESCRIPTION FIFTH CAUSE OF ACTION IMPLIED DEDICATION

LI

While there was some evidence that some homeowners and residents in Bel Marin Keys occasionally used "Easement A" area on the water, and maybe some of the land area, there is no evidence to warrant that any particular individual adversely used the "Easement A" for five years. The evidence is in fact to the contrary and the Court so finds.

LII

"Easement A" was not used adversely by the general public. Even access to the lagoon was restricted by the locks and special card keys used so as to exclude the general public. The Court observed during the hearing that Bel Marin Keys was about as public as Fort Knox.

LIII

The occasional use of "Easement A" by other homeowners was not adverse.

LIV

The occasional use of "Easement A" by other homeowners and residents of Bel Marin Keys was not continuous.

LV

The occasional use of "Easement A" by other homeowners and residents of Bel Marin Keys was not by persons who believed that the "public" had a right of such use. In

fact, the contrary is shown, that those using "Easement A" knew this was not a right of the general public and the Court so finds.

LVI

There was no affected or adverse use of "Easement A" by other homeowners and residents of the District, let alone for five years.

SIXTH CAUSE OF ACTION—
ABANDONMENT AND NONUSER

LVII

"Easement A" was created of record in 1964 and 1966 and the failure of the owners to build docks thereon between 1963 and 1974 does not establish any intent to abandon said "Easement A". The Court finds that there was **no intention** to abandon "Easement A" by the owners of the Gardens.

LVIII

There was no detriment or damage to BMKCSD, the owners of Lots 167 and 168, by the failure of the owners of the Gardens to build docks on "Easement A".

LIX

The mere fact that "Easement A" is not mentioned in several deeds does not establish an intent to abandon, particularly when the law of California expressly presumes the contrary under CC 1104 and provides that the easements pass whether mentioned or not.

LX

The fact that an attorney requested a deed does not establish an intent to abandon an easement. In fact it evidences an intent to keep just such an easement, and the Court so finds.

SEVENTH CAUSE OF ACTION—FAILURE TO GET
ARCHITECTURAL APPROVAL

LXI

The builders of the docks did obtain the approval of the Architectural Review Committee and the face of said plans contain the signature of the head of the Architectural Review Committee beneath the said approval.

EIGHTH CAUSE OF ACTION—
FAILURE TO GET AN EIR

LXII

Plaintiffs did not obtain an EIR before building said docks.

LXIII

The County decided that the issuance of the building permit did not involve a discretionary act and to have required an EIR would have given the Act retrospective application, and this Court independently finds in accordance with those decisions of the County of Marin.

LXIV

Large sums of money have been assessed against the Gardens as a result of the increased tax assessment for the improvement of the lagoon. The Gardens apartments

were assessed on an equal basis with every other property within the Bel Marin Keys Community Services District, regardless of whether or not those lots had direct access to the lagoon, and the tax rate was uniform as to all properties.

LXV

Considerable sums have been expended in constructing the docks, and it would occasion a hardship to require their removal.

LXVI

Said docks were built by the owners of the apartments and the contractors in reasonable reliance upon representations made by the BMKCSD and Mr. Aubel and others.

LXVII

It would be unfair and a burden to Plaintiffs to permit defendant or any of them to change their position so as to require the removal of the docks.

CONCLUSIONS OF LAW

I

"Easement A" was committed for the owners of the Gardens by the recording of the Map for Bel Marin Keys Unit No. 2.

II

"Easement A" as provided for in the Map to Bel Marin Keys Unit No. 2 and as stated in the CC&Rs was committed to the owners of the Gardens, and could not be changed by BMKCSD, the individual homeowners or Jack West, Jr.

III

"Easement A" came into legal existence, separate from the law of subdivisions, when the Map for Unit No. 2 was approved and recorded after the 30 trust deeds had been made to Eureka. These acts created the "Easement A" for the owners of the Gardens and gave them the right to build docks for the owners of the apartments.

VI

The docks as built upon "Easement A" conform with the terms creating said easement.

VII

The waters of the lagoon are navigable waters in fact.

VIII

The docks constructed on "Easement A" are an authorized use of the soil underlying the lagoon.

IX

The docks do not constitute an obstruction of the navigable waters of the lagoon.

X

The docks constructed on "Easement A" do not constitute a public or a private nuisance.

XI

The docks constructed on "Easement A" do not constitute a private nuisance as to the individual homeowner defendants.

XII

The District does not have standing to assert that the docks constitute a public nuisance.

XIII

The docks do not constitute a purpresture.

XIV

The docks do not interfere with the view and access of the BMKCSD or the private homeowner defendants.

XV

The District did not have the authority to enact a misdemeanor.

XVI

Ordinance No. 1 of the BMKCSD does not apply to "Easement A", and it is beyond the jurisdiction of the BMKCSD to apply it to "Easement A".

XVII

The owners of the Gardens did not require any permit from the District to build the docks on "Easement A".

XVIII

To have applied the Ordinance No. 1 to "Easement A" would have been to take property without due process of law and just compensation.

XIX

The failure of the owners of the Gardens to obtain a permit from the District to build the docks is without legal effect.

XX

None of the individual homeowners acquired an easement in "Easement A" by prescription.

XXI

There was no implied dedication of "Easement A".

XXII

The owners of the Gardens never lost "Easement A" by abandonment or nonuse, and they are the present owners of it today.

XXIII

The owners and builders of the docks on "Easement A" obtained all the necessary architectural approval as required by the CC&Rs, for Bel Marin Keys Unit No. 2.

XXIV

No EIR was required for the building of the docks. To have required an EIR would have been to give the act retrospective application.

XXV

The issuance of a permit was a ministerial act not requiring an EIR.

XXVI

The decisions of the County in not requiring an EIR are supported by substantial evidence and are correct. This Court finds and concludes in a like manner based upon an independent review of the evidence.

XXVII

There is no merit to the first cause of action asserted by plaintiff in the state court.

XXVIII

There is no merit to the second cause of action asserted by plaintiffs in the state court.

XXIX

There is no merit to the third cause of action asserted by plaintiffs in the state court.

XXX

There is no merit to the fourth cause of action asserted by plaintiffs in the state court.

XXXI

There is no merit to the fifth cause of action asserted by plaintiffs in the state court.

XXXII

There is no merit to the sixth cause of action asserted by plaintiffs in the state court.

XXXIII

There is no merit to the seventh cause of action asserted by plaintiffs in the state court.

XXXIV

There is no merit to the eighth cause of action asserted by the plaintiffs in the state court.

XXXV

The owners of the Gardens apartments (now the Townhouse Apartments) had the right to build the docks constructed on "Easement A".

XXXVI

The complaint for injunction and the restraining order or injunction pendente lite in the state court constitutes a cloud upon the title of the Trustee, Kal W. Lines and interferes with the administration of the estate in bankruptcy.

XXXVII

Kal W. Lines is the owner of "Easement A" free and clear of any claims of public or private persons.

XXXVIII

Kal W. Lines has the right to install and operate docks on "Easement A" free from interference.

XXXIX

The defendants are not entitled to an injunction, restraining order or stay of the installation, construction, maintenance or operation of said docks by plaintiff or any successor in interest.

Dated: July 31, 1975

/s/ Judge Conley Brown
Judge Conley Brown
Bankruptcy Judge